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Jan De Nul (M) Bhd v Berjaya Sompo Insurance Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC247–06 OF 2016
MOHD NAZLAN JC
24 JANUARY 2017

C

Civil Procedure — Striking out — Application for — Claim under insurance policy — Failure of insurer to indemnify insured party — Action filed by plaintiff similar to matters discussed and settled in arbitration proceedings — Whether plaintiff's statement of claim ought to struck out — Whether action caught by principle of res judicata — Whether action frivolous and vexatious and an abuse of court process — Whether action sustainable — Rules of Court 2012 O 18 r 19(1)(b) & (d)

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This was an application filed by the defendant to strike out the plaintiff's statement of claim under O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012. The plaintiff carried on the business as a dredging contractor and was part of the Jan De Nul group of companies. The defendant was in the business of underwriting of general insurance. In pursuance of a letter of award, Central Malaysian Properties Sdn Bhd ('CMP') appointed the plaintiff as the reclamation contractor in a land reclamation project. Specifically, the contractual works to be performed by the plaintiff concerned the reclamation of a plot of land ('the reclamation project'). In pursuance of the reclamation project, the defendant issued a contractor's all risk policy ('the CAR policy'), providing a contractor's all risk insurance coverage in favour of CMP as the insured. On 12 November 2010, an accident happened resulting in the loss of one life ('the reclamation failure'). The plaintiff notified the defendant of the reclamation failure. After investigating the matter, the defendant issued a letter of repudiation, denying liability or any losses arising from the reclamation failure. The plaintiff disagreed with the repudiation and subsequently filed the present suit for failing to: (a) indemnify the plaintiff against the unforeseen and sudden losses, notwithstanding that the same was covered under the CAR policy. The repudiation by the defendant was wrongful; (b) allow the plaintiff to fully participate in the assessment of CMP's claim to ensure that the plaintiff's rights and interests were protected, in particular by providing its input as to the cause of the reclamation failure incident; (c) allow the plaintiff to re-submit the insurance claim with the proper supporting documents; and/or (d) allow the plaintiff to submit a fresh insurance claim based on new facts, independent of the insurance claim made by CMP and pursuant to the plaintiff's own rights and interests under the CAR policy.

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Held, allowing the application:

(1) Jan De Nul Group, the holding company of the plaintiff filed arbitration proceedings in respect of the dispute against CMP and Tan Sri Vincent. The key issues for determination in the instant suit, which were the cause of the reclamation failure, was claimable or excepted by reason of being due to either faulty design or defective workmanship of the reclamation project, has not only been identified upfront and clearly defined, but also submitted to and ventilated before the arbitration proceedings. The answer to this instant suit had so clearly already been determined in the arbitration proceedings (see paras 21 & 41).

(2) The application of the principle of res judicata was fully justified. The plaintiff could not ask this court to decide on the same issues again. This court should not be put in an embarrassing position of having to make a decision on a matter already determined by a tribunal of competent jurisdiction and risk tendering a judgment inconsistent with the findings of the final award. The fact that the parties in the arbitration proceedings and in this instant suit were not exactly the same was not a bar to the application of res judicata (see paras 44 & 48).

(3) According to the plaintiff, its version of the mechanism of the reclamation failure was based on new facts which emerged after liability was repudiated by the defendant and after the conclusion of the arbitral proceedings between CMP and the plaintiff. The argument of new facts could not succeed because it was also barred by res judicata. Furthermore, there was no evidence proffered by the plaintiff which suggested that the new facts were unavailable to be discovered prior to arbitration proceedings (see paras 57 & 75).

(4) The defendant has, on a balance of probabilities, more than amply demonstrated that it was plain and obvious that, by reason principally of res judicata, the claim filed by the plaintiff was obviously unsustainable, frivolous, vexatious and an abuse of court process under O 18 r 19(1)(b) and (1)(d) of the ROC (see para 90).

[Bahasa Malaysia summary

Ini ialah permohonan yang difailkan oleh defendan untuk membatalkan pernyataan tuntutan plaintif bawah A 18 k 19(1)(b) dan (1)(d) Kaedah-Kaedah Mahkamah 2012. Plaintif menjalankan perniagaan sebagai kontraktor pengorekan dan merupakan sebahagian daripada kumpulan syarikat Jan De Nul. Defendan menjalankan perniagaan penajaan jamin insurans am. Dalam mendapatkan satu surat award, Central Malaysian Properties Sdn Bhd ('CMP') melantik plaintif sebagai kontraktor penebusgunaan dalam projek penebusgunaan tanah. Secara spesifiknya, kerja-kerja kontraktual yang perlu dijalankan oleh plaintiff ialah berkenaan penebusgunaan plot tanah ('projek penebusgunaan'). Dalam memperoleh

projek penebusgunaan, defendan mengeluarkan polisi semua risiko kontraktor ('polisi CAR'), memperuntukkan kontraktor dengan perlindungan insurans semua risiko berpihak pada CMP sebagai pihak yang diinsuranskan. Pada 12 November 2012, satu kemalangan berlaku, menyebabkan satu kematian ('kegagalan penebusgunaan'). Plaintif memaklumkan defendan tentang kegagalan penebusgunaan ini. Selepas menyiasat hal perkara ini, defendan mengeluarkan surat penolakan, menafikan liabiliti atas apa-apa kerugian yang timbul daripada kegagalan penebusgunaan. Plaintif tidak bersetuju dengan penolakan tersebut dan seterusnya memfailkan guaman ini bagi kegagal: (a) indemniti terhadap plaintif untuk kerugian tiba-tiba dan tidak boleh dijangka, walaupun semua ini dilindungi bawah polisi CAR. Penolakan oleh defendan adalah salah; (b) membenarkan plaintif mengambil bahagian sepenuhnya dalam taksiran tuntutan CMP untuk memastikan hak-hak dan kepentingan-kepentingan plaintif dilindungi, khususnya dengan memberi input tentang sebab insiden kegagalan penebusgunaan; (c) membenarkan plaintif menghujahkan semula tuntutan insuran dengan dokumen sokongan yang teratur; dan/atau (d) membenarkan plaintif menyerahkan tuntutan insurans baharu berdasarkan fakta baharu, bebas daripada tuntutan insurans yang dibuat oleh CMP dan berdasarkan hak-hak dan kepentingan plaintif sendiri bawah polisi CAR.

Diputuskan, membenarkan permohonan:

(1) Kumpulan Jan De Nul, syarikat pegangan plaintif, memfailkan prosiding timbang tara bagi pertikaian antara CMP dan Tan Sri Vincent. Isu-isu utama bagi pemutusan dalam guaman ini, iaitu sebab kegagalan penebusgunaan, boleh dituntut dan dikecualikan berdasarkan alasan projek penebusgunaan tersebut mempunya rekaan yang rosak atau kerja-kerja tangan yang cacat, bukan sahaja tidak dikenal pasti dan dinyatakan dari awal lagi, tetapi juga telah dihujahkan dan diselesaikan semasa prosiding timbang tara. Jawapan untuk guaman ini jelas telah diputuskan dalam prosiding timbang tara (lihat perenggan 21 & 41).

(2) Pemakaian prinsip res judicata adalah sangat wajar. Plaintif tidak boleh memohon kepada mahkamah ini untuk memutuskan isu-isu yang sama sekali lagi. Mahkamah ini tidak patut diletakkan dalam kedudukan yang memalukan iaitu membuat keputusan tentang hal perkara yang telah diputuskan oleh tribunal yang mempunyai bidang kuasa kompeten dan mengambil risiko mengemukakan penghakiman yang tidak konsisten dengan dapatan award akhir. Fakta bahawa pihak-pihak dalam prosiding timbang tara dan guaman ini bukan sama bukanlah penghalang pemakaian res judicata (lihat perenggan 44 & 48).

(3) Menurut plaintif, versi mekanismenya tentang kegagalan penebusgunaan adalah berdasarkan fakta-fakta yang timbul selepas penolakan oleh defendan dan selepas muktamadnya prosiding timbang

tara antara CMP dan plaintif. Hujahan fakta-fakta baharu ini tidak boleh berjaya kerana ia juga dihalang oleh res judicata. Tambahan lagi, tiada keterangan yang dikemukakan oleh plaintif yang mencadangkan bahawa fakta-fakta baharu tidak wujud untuk dizahirkan sebelum prosiding timbang tara (lihat perenggan 57 & 75).

(4) Defendan telah, atas imbangan kebarangkalian, lebih daripada menunjukkan bahawa jelas dan nata bahawa, atas alasan utama res judicata, tuntutan yang difailkan oleh plaintif jelas tidak boleh dikekalkan, remeh dan menyusahkan dan satu salah guna proses mahkamah bawah A 18 k 19(1)(b) dan (d) KKM (lihat perenggan 90).]

Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9281–9311.

Cases referred to

Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor [1993] 1 MLJ 306, HC (refd)

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

AXA Affin Assurance Bhd v MTD Construction Sdn Bhd [2013] 6 MLJ 323, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2), Rayner and Keeler Ltd v Courts [1967] 1 AC 853, HL (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Dumitrov v SC Johnson & Son Superannuation Pty Ltd & Anor [2006] NSWSC 1372, SC (refd)

Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Huawei Tech Investment Co Ltd v Transition Systems (M) Sdn Bhd [2013] 5 MLJ 396, CA (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Lee Mun Lyn v Wong Kok Tung & Ors [2015] MLJU 1226; [2015] 1 LNS 1246, HC (refd)

Lee Thye @ Lee Chooi Yoke v Societe Generale Cawangan Singapura [2009] 6 MLJ 24, CA (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p

Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 4 MLJ 541; [2011] 5 CLJ 866, CA (distd)
Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660, FC (refd)
North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (refd)
OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544; [1997] 2 CLJ 534, CA (refd)
Punca Klasik Sdn Bhd v Seok Kim Leow [1996] 5 MLJ 241, HC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (distd)

Legislation referred to

Companies Act 1965 s 221
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d), O 56 r 1(3A)

Rajendra Navaratnam (Mak Hon Pan with him) (Azman, Davidson & Co) for the plaintiff.
Sreether S (Amudha Jayaraman) (Murali B Pillai & Assoc) for the defendant.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an application filed by the defendant in encl 5 to strike out the statement of claim of the plaintiff in pursuance of O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012 ('the RC 2012'). I allowed the striking out of the statement of claim at the end of the hearing on 15 November 2016, highlighting the broad grounds for my decision, essentially by reason of res judicata. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

The litigants

[2] The plaintiff is a locally incorporated private company. It carries on the business as a dredging contractor, and is part of the Jan De Nul group of companies which is based in Luxembourg and is said to be one of the leading dredging contractors in the world.

The defendant is a public company and is in the business of underwriting of general insurance.

The reclamation project

[3] In pursuance of a letter of award dated 9 February 2010, Central Malaysian Properties Sdn Bhd ('CMP') appointed the plaintiff as the reclamation contractor in a land reclamation project. Specifically, the contractual works to be performed by the plaintiff concerned the reclamation of a plot of land of 38.11 hectares along an approximately two kilometres long stretch of existing shoreline bordering west of the causeway connecting Johor to Singapore ('the reclamation project').

[4] The defendant and CMP are related as they are part of the Berjaya Group of Companies headed by Tan Sri Vincent Tan.

The insurance

[5] In pursuance of the reclamation project, the defendant issued a Contractor's All Risk Policy dated 2 March 2010 ('the CAR policy'), providing a Contractor's All Risk insurance coverage in favour of CMP as the insured and named as principal, and of CMP's contractors and any other subcontractors in any tiers, the consulting engineer, architects, project manager, financing parties, government bodies and all other professional consultants engaged by the insured in connection with the reclamation project as their interests may appear for their respective rights and interests.

The incidence of loss

[6] On 12 November 2010, about 10pm in the evening to be exact, much of the reclaimed platform worked on by the plaintiff gave way and moved southwards resulting in the loss of one life ('the reclamation failure'). The plaintiff, by a letter dated 15 November 2010 duly notified the defendant of the reclamation failure in adherence to cl 5(a) of the CAR policy.

Repudiation by the defendant

[7] Upon completion of its investigations, the defendant issued a letter of repudiation dated 11 August 2011 to CMP, denying liability for any losses arising from the reclamation failure, for the following reasons:

(a) the design report forwarded to the defendant states that the land reclamation works were to be carried out in a staged construction method. The designed staged construction method was not stated in the design drawings;

(b) the land reclamation works were carried out in a single rapid filling phase without any rest period;

(c) the independent analysis carried out by the defendant indicates that the reclamation, when carried out in a single rapid filling phase, as had been

done, would cause the reclaimed land to be unstable and the factor of safety to be less than unity, which in turn cause the slopes to fail; and the back analysis showed the soil strength was less than that needed to sustain the reclaimed land;

(d) the entire loss was therefore not covered under the CAR policy as it was due to defective workmanship; and

(e) furthermore, the loss was also due to wilful act and/or wilful negligence as the plaintiff did not follow the staged construction method stated in the design report.

[8] The plaintiff disagreed with the repudiation by the defendant. Hence the instant proceeding filed by the former to claim against the latter under the CAR policy.

[9] Based on the foregoing, the plaintiff initiated the present suit against the defendant for, inter alia, failing to:

(a) indemnify the plaintiff against unforeseen and sudden losses, notwithstanding that the same is covered under the CAR policy. The repudiation by the defendant was wrongful; and/or

(b) further or alternatively, allow the plaintiff to fully participate in the assessment of CMP's claim to ensure that the plaintiff's rights and interests were protected, in particular by providing its input as to the cause of the reclamation failure incident; and/or

(c) allow the plaintiff to re-submit the insurance claim with the proper supporting documents; and/or

(d) allow the plaintiff to submit a fresh insurance claim based on new facts, independent of the insurance claim made by CMP and pursuant to the plaintiff's own rights and interests under the CAR policy,

EVALUATION AND FINDINGS OF THIS COURT

The law on striking out

[10] The instant application is for the striking out of the suit filed by the plaintiff. The leading authority on the law on striking out under O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, and in particular the following part of the judgment of Mohamed Dzaiddin SCJ (as he then was):

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only

A in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised B by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in *pari* C *materia* with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[11] This leading case of *Bandar Builder Sdn Bhd & Ors v United Malayan* D *Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 has well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable. It is therefore only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

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The relevant terms of the CAR policy coverage

[12] The coverage of the CAR policy is stated in section 1 therein in the following terms:

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> The Insurers hereby agree with the Insured that if at any time during the period of cover the items or part thereof entered in the Schedule shall suffer any unforeseen and sudden physical loss or damage from any cause *other than those specifically excluded*, in a manner necessitating repair or replacement, the Insurers will G indemnify the Insured in respect of such loss or damage as hereinafter provided ... (Emphasis added.)

[13] It is thus not disputed that section 1 of the CAR policy provides for the contractual obligation on the part of the defendant as the insurer to indemnify H the plaintiff, being the insured, against any unforeseen and sudden physical loss or damage to the contract as stated in the schedule, which in the instant case, is the reclamation project, from any cause other than those specifically excluded.

I **[14]** It is important to note, as one would in respect of any insurance coverage, what are matters which are specifically excluded, for these would render the insurance company not liable to effect the indemnity. If the cause of the loss or damage in respect of the reclamation failure was excluded under the CAR policy, no coverage can be invoked under the same.

[15] What does the special exclusions in the CAR policy in the instant case say? The special exclusions to section 1 of the CAR policy provide, for purposes relevant to this instant case, that the defendant shall not be liable for:

> (c) loss or damage due to faulty design;
>
> (d) the costs of replacement, repair or rectification of detective material and/or workmanship but this exclusion shall be limited to the items immediately affected and shall not be deemed to be exclude loss of or damage to correctly executed items resulting from an accident due to such defective material and/or workmanship.'

[16] The special exclusions to the CAR policy is further endorsed with endorsement (115) cover for designer's risk (resultant damage only) ('endorsement 115') which for all intents and purposes varies the exclusions set out in the aforesaid paras (c) and (d). Endorsement 115 of the CAR policy states as follows:

> (115) Cover for Designer's Risk (Resultant Damage Only)
>
> It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the Policy or endorsed thereon and subject to the Insured having paid extra premium, exclusion c) under the Special Exclusions to Section 1 of the policy shall be deleted and exclusion d) replaced by the following wording:
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> > (d) The costs of replacement, repair or rectification of loss or damage to items due to defective material and/or workmanship and/or faulty design but this exclusion shall be limited to items immediately affected and shall not be deemed to exclude loss of or damage to correctly executed items resulting from an accident due to such defective material and/or workmanship and/or faulty design.
> >
> > Limit: 10% of loss and maximum of RM10,000,000.00 in the aggregate during the period of cover.

[17] As such, the net effect of endorsement 115 is unmistakable. The exclusions in the aforementioned paras (c) and (d) of the CAR policy were thus amended and varied to the effect that the CAR policy does not provide coverage for loss or damage to items immediately affected due to faulty design and/or defective workmanship but does at the same time so provide in respect of the loss or damage to items correctly executed resulting from an accident due to such defective workmanship or faulty design.

Essence of repudiation

[18] The plaintiff, as mentioned above, sought to claim coverage under the CAR policy as a result of the reclamation failure. The defendant had already notified CMP that it had rejected coverage. It was contended by the defendant

that endorsement 115 applied and the repudiation was thus justified as any loss was excluded given the premise that the reclamation failure was caused by defective workmanship. This in essence is also the defence of the defendant in its resistance to the claim instituted by the plaintiff.

[19] In particular, it was the position of the defendant that the construction of the reclamation project was flawed and not done in accordance with the manner stipulated. The design report forwarded to the defendant states that the project was to be carried out in a staged construction method. The design staged construction method was not stated in the design drawings. The reclamation project was instead performed in a single rapid filling phase without any rest period. In other words, it was not carried out in a staged construction method. Further, an independent analysis undertaken by the defendant showed that the reclamation, when carried out in a single rapid filling phases, as had been the case herein, would render the reclaimed land to be unstable and the factor of safety to be less than unity. This, according to the defendant, caused the slopes to fail. And the back analysis exhibited that the relevant soil strength was less than the level so prescribed to sustain the stability and load of the reclaimed land.

[20] For the purposes of this application however, it is of significant importance to appreciate that the claim of the plaintiff against the defendant is for the latter to indemnify the former under the CAR policy coverage. The defendant, as stated earlier, contended that the loss was excluded by endorsement 115 of the CAR policy. It is thus quite clear that the crux of the dispute between the litigants is the question whether the loss arising from the reclamation failure fall within the section 1 of the CAR policy, and if so, whether the reclamation failure was due or caused by faulty design or defective workmanship, rendering the application of endorsement 115 and thus the exclusion and repudiation of liability on the part of the defendant.

[21] The reclamation failure happened on 12 November 2010. On 16 November 2010, the plaintiff terminated the construction contract in respect of the reclamation project and, as the first claimant together with Jan De Nul Group (Sofidra SA), the ultimate holding company of the plaintiff as the second claimant, filed arbitration proceedings in respect of the dispute against CMP and Tan Sri Vincent Tan as respondents, held at the KLRCA under case No KLRCA/D/ADM-32–2011.

[22] The arbitral proceedings were initiated on 12 August 2011 and the final award was issued by the arbitral tribunal on 3 September 2015 which was later slightly amended by way of a correction to the final award dated 5 October 2016.

[23] The plaintiff's claim against CMP was for breach of contract and for reliefs for loss and damage arising from its termination of the contract. CMP counterclaimed against the plaintiff in contract and negligence for losses arising from the reclamation failure.

[24] The essence of the striking out application by the defendant is that the issue of whether the reclamation failure was caused by faulty design or defective workmanship had already been previously considered and determined. I agree with the position taken by the defendant that the same issue had already been decided in the arbitration proceeding between the plaintiff and CMP. It is thus res judicata.

[25] The arbitration proceedings between the plaintiff and CMP was obviously not concerning coverage under the CAR policy issued by the defendant. It did not even involve the defendant as a party. The proceedings centred on a contractual dispute on the construction contract of 9 February 2010 referred to earlier, in respect of the reclamation project which had been insured under the CAR policy, and where the loss and damage occasioned by the reclamation failure occurred.

Res judicata

[26] But there can be no clearer example of res judicata than this since this very issue had already been specifically adjudicated and determined, as well as appealed against.

[27] *The Oxford Dictionary of Law* (New Ed) states that in Latin, res judicata means a matter that has been decided. The classic definition of res judicata, as stated in *Black's Law Dictionary* (7th Ed), was referred to in the judgment of the Federal Court in *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660, in the following terms:

> [6] Res judicata is defined in *Black's Law Dictionary* (7th Ed) as follows:
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> > [Literally in Latin 'a thing adjudicated'] 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring parties from litigating a second lawful lawsuit on the same claim, or any other claim arising from the same transactions and that could have been — but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. Restatement (Second) of Judgments ss 17, 24 (1982) — Also termed *res adjudicata,* claim preclusion. Cf Collateral Estoppel.
> >
> > Res judicata has been used in this section as a general term referring to all new ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two

quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing re-litigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated, had gone under the name, 'true res judicata' or the names 'merger' and 'bar', The second doctrine, preclusion of matters that have once been decided, has usually been called 'collateral estoppel' ...

[7] George Spencer Bower and Sir Alexander Kingcome Turner in their book *The Doctrine of Res Judicata* (2nd Ed) at p 1 defined *res judicata*, *inter alia*, as follows:

[21] In English jurisprudence a *res judicata*, that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies.

[8] The common law doctrine of *res judicata* has been incorporated into the statute law in Malaysia as can be found in s 25(2) of the Courts of Judicature Act 1964 ('the CJA') which confers additional powers to the High Court as set out in item 11 of the schedule to the CJA as follows:

[11] Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or by reason of multiplicity of proceedings in any Court or Courts the proceedings ought not to be continued.

[28] Case law authorities suggest that res judicata is the most common ground relied on for striking out applications on the basis of the pleadings being frivolous and vexatious. In the case of *Jamir Hassan v Kang Min* [1992] 2 MLJ 46, the High Court considered the history of the case in the previous actions and allowed the application to strike out given that the statement of claim was found to be vexatious and an abuse of the process of the court. A similar finding was arrived at in *Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor* [1993] 1 MLJ 306, where the plea of res judicata was successful in striking out the suit as also being frivolous, vexatious as well as an abuse of the process of the court.

[29] In the instant case, the issue of whether the loss and damage occasioned by the reclamation failure was covered under the CAR policy had already been decided in the arbitration proceedings. This is a compelling conclusion borne out of the sward, in terms indisputably and comprehensively unambiguous, when regard be had to three principal parts of the award, specifically; firstly, the issues identified by parties in the arbitration proceedings, secondly, the submissions by the parties and thirdly, the actual findings of the arbitral panel.

Same issues — The agreed issues in arbitration

[30] The final award dated 3 September 2015 as exhibited to the affidavit in support affirmed by the head of claims division of the defendant on 19 September 2016 contains a section G entitled 'Agreed Issues for determination', at pp 29 of the 162-page award. Paragraph 143 at p 29 states clearly as follows:

> 143. The Agreed Issues, as modified following the discussion between counsel and the Tribunal, are:
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> (a) Issue 1: Whether the Claimants' determination of the Contract pursuant to the Notice of Determination was valid;
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> (b) Issue 2: Whether the Claimants are entitled to their claim and if so, what is the quantum?
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> (c) *Issue 3: What was the cause of the Reclamation Failure Incident?*
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> (d) *Issue 4: Who was responsible for the Reclamation Failure Incident?*
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> (e) Issue 5: Whether the Respondents are entitled to their claims and if so, what is the quantum?
>
> (f) Issue 6: Whether the Reclamation Failure Incident could have been avoided and if so, its legal consequences. (Emphasis added.)

[31] It will be readily recalled that the issue of whether the plaintiff could succeed in its claim under the CAR policy depends on whether or not the exclusion clauses could be invoked. Whether or not they can be made to apply to exclude liability manifestly depends on the terms of such clauses, which focused on the causes of the reclamation failure. As stated earlier, the excluded causes principally concern faulty design and defective workmanship.

[32] Yet, it is as clear as day that the said question on the claim filed by the plaintiff in the instant suit is exactly the very issues so expressly identified in numbers 3 and 4 in para 143, as aforesaid, specifically on the causes of and responsibility for the reclamation failure.

Same issues — Principal contention of parties in arbitration

[33] As further contained in the final award, the stance of CMP (as the respondent in the arbitration proceedings) was that the reclamation failure would not have happened had the plaintiff (as the claimant therein) maintained the factor of safety ('FOS') of 1.2 and ensured the stability of the works by, among others, performing ground treatment works for the reclamation project, which included the staged construction method. As an example, at para 196 of the final award it is stated thus:

> The Respondent, on the other hand, contend that the Contract is silent as to the exact method of achieving the design, and that due to this lack of design

information, it was for the Claimant to deliver the works as they saw fit, whilst maintaining a FOS of 1.2 and maintaining stability of the works.

[34] In its submission, as recorded by the final award, CMP argued that the plaintiff had breached its obligations under the contract by not complying with its works method statement ('the method statement') and by not installing the required monitoring equipment and that the plaintiff should, in relation to the reclamation project, have undertaken the staged construction method with adequate resting period as indicated by the plaintiff's own works programme. It was also submitted before the arbitral panel that the staged construction method was a works method, and thus a workmanship issue.

[35] The plaintiff, in contradistinction, argued in the arbitration proceedings that any ground treatment works or the staged construction method was a design issue. Thus the final award recorded at para 157(b) the plaintiff's contention that:

> ... the Contract was a construct only agreement, which did not involve it in any aspect of design and that if further works were needed for improvement to the seabed, such works should have been included with the design ...

[36] The plaintiff's own expert in the arbitration proceedings was recorded in the final award as taking the position that staged construction was a design methodology (para 203). Equally significantly, if not more, the plaintiff asserted that such a design issue was CMP's responsibility, and not within the plaintiff's remit.

[37] It is worthy of emphasis that the plaintiff argued that if indeed the cause of the reclamation failure was shortcomings in ground improvement efforts, this would be a design issue, and not, as argued by CMP, a works method, or a defective workmanship issue. Thus at para 207 of the final award, the plaintiff's position was set out as follows:

> ... if the Reclamation Failure Incident occurred due to a failure to undertake ground improvement and such ground improvement required a design element, then the design itself is faulty for not having included it, thus absolving the Claimant from liability.

[38] Thus, it is quite plain that the parties to the arbitration proceedings had raised and made submissions on the very issue of the cause of the reclamation failure, with the specificity that concerns design and workmanship issues, being the crux of the exclusions in endorsement 115 of the CAR policy. As if this was not sufficiently manifest, the findings of the arbitral panel makes the cogency of the res judicata argument both compelling and inevitable.

Same issues — Findings of the arbitral panel

[39] I can do no better than reproduce the relevant parts of the findings of the arbitral panel in respect of the reclamation failure, as follows:

H. The Reclamation Failure Incident

178. The Tribunal finds that notwithstanding the supply of the Soil Investigation Report, the Contract makes clear that the Contract Sum which was to be paid for the works included all things necessary for the delivery of the works, the Contract also makes clear that the claimants were obligated to familiarise with the site. In effect, the claimants contractually took on the risk as to the conditions that were to be encountered during the execution of the works.

...

179. The Contract further makes clear that the claimants are responsible for the stability and care of the works during construction:

...

183. ... at issue in these proceedings are the appropriate method for strengthening the underlying soil in the reclamation area, known as ground treatment. Appropriate ground treatment, where required in a reclamation process, improves the stability of the works by increasing the amount of weight that sub-soil beneath the reclamation can withstand.

...

203. The Tribunal does not doubt the evidence of Hendy that staged construction is a design method, and that, by reference to the CIRIA Guide, it is best practice to have an integrated approach to such a method between designer and constructor, however, reference to the CIRIA Guide itself shows that what is portrayed is a 'suggestion for a division of responsibilities between the designer and specialist contractor. Other divisions are possible, and may be as valid ...' When pressed on this point in cross examination, Hendy, rightfully, clarified that while he considered staged construction a design methodology, that he was not opining as to who bore the responsibility for undertaking that design.

...

207. If the design as provided to the claimant was inherently not able to be built, such liability would clearly fall onto the respondents, however, that has not been alleged in these proceedings. The claimants' contention is, at its heart, that if the Reclamation Failure Incident occurred due to a failure to undertake ground improvement, and such improvement required a design element, then the design itself is faulty for not having included it, thus absolving the claimants from liability. The Tribunal rejects this contention.

208. The claimants contracted with the respondents based on the extent of the design as provided. They further contracted with the respondents having taken responsibility for the conditions present on the site and having been provided with the SI. The claimants contracted to do all things necessary for delivery of the works as set out in the

A design, and if an element of design was required to complete those works the Tribunal considers that such design would be 'to the extent required by the Contract' as required by clause 7.2(a) of the Conditions.

B 209. A review of the Claimants' Method Statement indicates that the claimants planned for the execution of the works in a manner that would constitute design on the claimants' analysis. For instance, the Method Statement includes details as to the provision of a pipeline which assumedly would require engineering on the part of the claimants, and contains details as to equipment selection and profiles of handover slopes which would fit within the description of specifications of a 'sophisticated contract' as per Pentagon.

C ...

214. The true test of interpretation here is as set out above, what would reasonable people, in the position of the claimant and the respondent have read the Contract to mean? The Tribunal finds that a reasonable person would consider that the Contract
D obligates the claimant to build the works as designed by the respondents, and to do all thing necessary to complete those works, irrespective of whether such activities were to be considered design.

...

E 225. The claimants have responded to this claim in two ways. One way in which they have responded is to maintain that the claimants have no responsibility for design, in particular design in relation to ground improvement, and any failure is therefore to the account of the respondents. The Tribunal has rejected this argument in its interpretation of the Contract as set out above.

F ...

269. The Contract is clear in that the claimants bear the responsibility for stability of the works during construction. It is also clear in that the claimants were obligated to maintain a FOS of 1.2 during the construction of the works. It is also clear that the works collapsed, and on the evidence of the experts, the failure occurred below the level
G of the fill.

...

272. The claimants have been critical of the respondents' theory of the Reclamation Failure Incident, stating that '[i] cannot be disputed that there was no detailed forensic study done to determine the cause of failure with any level of confidence'. However,
H this is in contract with the evidence of Hendy who stated that 'such a forensic study would be expensive and time-consuming and the outcome may not significantly influence the findings of the Tribunal. Such a study would also now be hampered by the long time period that has elapsed since the collapse'.

I ...

295. In the light of the above, the Tribunal finds that:

(a) In relation to issue 3, that the cause of the Reclamation Failure Incident was a failure of stability due to a lack of strength in the materials located underneath the fill; and

(b) In relation to issue 4, that the claimants are responsible for the Reclamation Failure Incident; and

(c) In relation to issue 6, the Tribunal finds that the Reclamation Failure Incident could have been avoided, however this hypothetical possibility has no consequences to the decision of the Tribunal in this arbitration.

[40] In essence, the arbitral panel had made the determination that:

(a) the cause of the reclamation failure was defective ground treatment work;

(b) the ground treatment work was a design issue;

(c) appropriate ground treatment work was the responsibility of the plaintiff; and

(d) the reclamation project could have been built with the appropriate design and construction workmanship.

[41] As such, the key issues for determination in the instant suit, which are the cause of the reclamation failure and whether the loss and damage resulting from the reclamation failure is claimable or excepted by reason of being due to either faulty design or defective workmanship of the reclamation project, has not only been identified upfront and clearly defined, but also submitted to and ventilated before the arbitration proceedings, not to mention as well as specifically examined and adjudicated by the arbitral panel. The answer to this instant suit has thus so clearly already been determined in the arbitration proceedings. Accordingly, as the reclamation failure was caused by faulty design or defective workmanship, the loss and damage which had resulted therefrom is excluded under endorsement 115 of the CAR policy.

[42] And it cannot be emphasised enough that the evidence of the geotechnical expert for the plaintiff, Michael Sutton Hendy before the arbitral proceedings agreed that the cause of the reclamation failure was a lack of design or a design issue which thus crystal clearly demonstrates that the loss falls under endorsement 115 of the CAR policy. Under the CAR policy, and as stated in the final award, the question of who was responsible for the faulty design is immaterial.

[43] Further, it bears emphasis that the plaintiff's application to the High Court to set aside the final award was unsuccessful and the decision of the arbitral panel thus upheld.

[44] The application of the principle of res judicata is thus fully justified. The issues to be decided in this instant suit have been adjudicated and determined

earlier in the arbitration proceedings. The plaintiff cannot ask this court to decide on the same issues again. The application to set aside the final award too had been dismissed by the High Court, and there is no appeal against the decision of the High Court. This court should not be put in an embarrassing position of having to make a decision on a matter already determined by a tribunal of competent jurisdiction, and risk rendering a judgment inconsistent with the findings of the final award. An efficient, just and orderly legal system respects the finality of decisions and judgments. Otherwise, confusion may reign, more so when a re-litigation of the same issues, requiring the examination of substantially the same evidence and witnesses would also cause unnecessary wastage of time and resources.

Different parties immaterial

[45] The plaintiff argued however that the arbitration between CMP and the plaintiff is a proceedings between different parties (as against the parties in the present suit involving the plaintiff and the defendant), and it was contended, with different causes of action and considerations.

[46] The position in law on whether res judicata applies to a subsequent suit involving a different party is already settled. In the Court of Appeal in the case of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 4 MLJ 541; [2011] 5 CLJ 866 (Tab A) held thus:

> Literally translated, res judicata is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) *should not be litigated more than once even if the parties are different*. It prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive (see *Henderson v Henderson* [1843] 3 Hare 100). The criminal law equivalent is the doctrine of double jeopardy. (Emphasis added.)

[47] More recently, in the Court of Appeal decision in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062, Idrus Harun JCA instructively held as follows:

> [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of res judicata as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. *The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions.* What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject

matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur*). (Emphasis added.)

[48] As such, the fact that the parties in the arbitration proceedings and in this instant suit are not exactly the same is therefore not a bar to the application of res judicata. The fundamental objection is against the re-litigation of the same issue, which would be the situation should this instant suit be allowed to progress. In any event, the plaintiff herein, being the litigant instituting the suit, was a party in the earlier proceedings.

Different types of action?

[49] The plaintiff also argued that the plaintiff's cause of action in the arbitral proceedings was for unpaid fees whilst the counterclaim of CMP was premised principally on their position that the plaintiff was responsible for the reclamation failure. Further, as a defence to the counterclaim in the arbitral proceedings, the plaintiff took a tactical decision to put CMP to prove their case against the plaintiff and not put forward an alternative theory for the reclamation failure due to the considerations of the allocation of risks in its contract with CMP.

[50] A key difference in that proceeding, according to the plaintiff, is that the plaintiff could not establish what was in its view the likely cause in the arbitration without incriminating itself, as the construction contract placed the risk of unforeseen ground conditions on the contractor. Clause 7.2(a) of the conditions of contract provides:

The Contractor shall take full responsibility for the adequacy, stability and safety of all operations and methods of construction. Provided that the Contractor shall not be responsible (except otherwise stated in the Contractor or as may be otherwise agreed in writing between the Employer and the Contractor) for the design of the Works or for the design of any Temporary Works not prepared by the Contractor or by his sub-contractors or suppliers.

[51] Thus, so the plaintiff contended, the cause of action in the arbitration proceedings and in the instant case is different. The former is founded upon the division of risk and responsibilities of an employer vis a vis the main contractor in a construction contract whereas the latter concerns the issue whether the reclamation failure is covered by the CAR policy.

[52] The plaintiff sought to rely primarily on the same decision of the Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 4 MLJ

A 541; [2011] 5 CLJ 866 which ruled that separate actions would not bar the raising of evidence on the same issue. It was held thus:

> [20] It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For the reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issued at the recovery action stage.

[53] I do not find this line of argument of the plaintiff to be meritorious. The claims in the arbitration and in the instant case concern responsibility for the reclamation failure. The issues considered and adjudicated in the arbitration proceedings, as shown earlier, would be the exact ones to be ventilated in the instant suit. It had been determined that the plaintiff was responsible for the reclamation failure. In the instant suit, in order to succeed the plaintiff must show that its claim fall under the CAR policy coverage. But it cannot succeed herein if the reclamation failure is due to a faulty design or a defective workmanship, the very issue that had been determined by the arbitral panel against the plaintiff.

[54] In *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 4 MLJ 541; [2011] 5 CLJ 866 the issue of whether the deceased was a mere passenger or employed under a contract of service to determine liability of the insurer was not before the earlier liability proceedings. In other words, the issue in the liability action and the subsequent recovery action was not identical. That is quite unlike the instant case where in order to determine the liability of the defendant as the insurer, the very issue concerning the flaws in the ground treatment and stability works — a form of a faulty design or defective workmanship — as a cause of the reclamation failure had already been decided in the earlier arbitration proceedings. The arbitration then determined and the present suit now is invited to decide on an issue that arises out of identical facts and dependent on the same evidence.

[55] The critical consideration is that there is no real difference between the issue to be litigated in the instant suit and that already decided by the arbitral panel in the sense described in the English case relied on by the plaintiff of *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547. In my view the issue determined earlier and sought to be determined presently are substantially if not exactly one and the same.

New facts not considered previously?

[56] Another more fundamental objection raised by the plaintiff against this striking out application is this. The plaintiff does not dispute that the issue of

whether the claim is excluded under the CAR policy depends largely on the cause of the reclamation failure but instead submits that the final award is not binding on this court because its claim now under the CAR policy is based on *new facts* which were said to have been discovered only after the final award.

[57] It is the contention of the plaintiff that its version of the mechanism of the reclamation failure is based on new facts ('new facts') which emerged after liability was repudiated by the defendant and after the conclusion of the arbitral proceedings between CMP and the plaintiff. Essentially, the plaintiff submitted that given that the plaintiff faced liability for the reclamation failure in the arbitral proceedings between CMP and the plaintiff, the plaintiff proceeded to make further investigation to ascertain if the reclamation failure was in fact caused by the matters canvassed in the arbitration.

[58] The plaintiff's investigation now led to a preliminary view that there in fact may have been unforeseen discontinuities in the seabed levels at the reclamation project which made the plaintiff seek further hard evidence to confirm the plaintiff's theory. The plaintiff made inquiries and obtained information from the United Kingdom Hydrographic Office, which included hydrographic charts for years 1921 and 1923 ('Historical Hydrographic Charts') of the area to be reclaimed as well as its surroundings which shows that the water depths there prior to the completion of the Johor-Singapore Causeway were deeper than at present and that the natural seabed was downward sloping. The plaintiff submitted that in contrast, the current hydrographic charts ('current hydrographic charts') show a relatively flat seabed.

[59] Thus the plaintiff submitted that when the historical hydrographic charts are compared to the current hydrographic charts, it would become clear that given the peculiar circumstances of the site, the real features and the bathymetry or submerged terrain of the natural seabed, including the deepest point, had been hidden. As such, the plaintiff is now contending that if the 'true' natural seabed levels as presently shown by the historical charts are taken into consideration, the plaintiff would be able to demonstrate that the pre-conditions for an underwater landslide were present.

[60] The plaintiff's contention that this therefore shows that the reclamation failure was due neither to defective workmanship nor faulty design but instead caused by special problems of a nature which were unpredictable, exceptional and/or resulted from a combination of unusual factors, which could not have been reasonably assessed and resolved at the design stage. Given the new facts, the issue of whether the reclamation failure was caused by the mechanism employed by the plaintiff, or whether the same is excluded under the CAR

policy is a question of fact that could only be properly determined by this court at full trial, with the benefit of the assistance of expert reports and expert witnesses.

Wide application of issue estoppel

[61] In my assessment, the plaintiff's argument concerning the subsequent discovery of new facts cannot succeed because it is also barred by res judicata. For it is fairly well settled in local jurisprudence that the principle of res judicata is of wider remit, and extends to matters which are part of the subject matter of a litigation which ought to have been raised even if not actually raised to be determined, due either to inadvertence or by conscious design.

[62] The Supreme Court made it clear in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 that there are two kinds of *estoppel per rem judicatum*, namely cause of action estoppel and issue estoppel. The scope of the plea of res judicata was clarified in the following terms:

> [1] The significance of res judicata lies in its effect of creating an *estoppel per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> [2] The doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. *It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.* (Emphasis added.)

[63] The Supreme Court referred to and applied the following common law principles in its exposition of the scope of the doctrine of res judicata. First, the passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which reads:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[64] In addition, the meaning of the words in the said above statement, namely 'every point which properly belonged to the subject of litigation' was

explained by Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[65] There are a number of other local cases which have since followed this principle (see *Huawei Tech Investment Co Ltd v Transition Systems (M) Sdn Bhd* [2013] 5 MLJ 396 and *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534). I therefore hold that the issue of the cause of and responsibility for the reclamation failure to be considered in the instant action as filed by the plaintiff is so manifestly res judicata and clearly thus cannot be further pursued.

[66] The plaintiff argued that for issue estoppel to operate, the decision on an issue must have been a 'necessary step' to the decision or 'a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision' (see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2), Rayner and Keeler Ltd v Courts* [1967] 1 AC 853). But I cannot but agree that the issue in question in the instant case, which concerns the cause of and responsibility for the reclamation failure is more than merely a groundwork or a necessary step to the decision, and had specifically and clearly already been previously adjudicated and that same issue was absolutely critical to the decision of this court.

[67] It is accurate to state, I should reiterate, that the plea of res judicata, particularly on issue estoppel, is not merely confined to matters already actually adjudicated upon judicially. The expansive doctrine of res judicata extends also, on the basis of case law authorities, to matters which have not been decided but nevertheless exhibit the following features:

(a) being part of the subject matter of the other, earlier litigation;

(b) could or should have been raised thereat; and

(c) had not actually been raised, either due to negligence, inadvertence or deliberately.

[68] Does the present case come within the above test of the scope of res judicata? My short answer is resoundingly in the affirmative. The new facts, as alleged by the plaintiff could, in my view have been raised by the plaintiff in the arbitration proceedings. But they were not. And the plaintiff's omission was a deliberate decision on its part. As stated earlier, and as stated by the arbitral

panel in the final award, the plaintiff made a deliberate forensic decision not to lead evidence as to the cause of the reclamation failure.

[69] The plaintiff did not venture a theory of its own, but instead required CMP, as the employer to prove its theory of staged construction, and to contend that this was a matter of design, which by the terms of the contract it was excused. According to the plaintiff, the fact that the plaintiff did not venture a theory of its own is an important differentiator. The plaintiff's expert only testified as to the mechanism (a flow slide to explain why the whole platform slipped into the sea), not the cause. Hence the evidence as to cause was not fully ventilated as in a normal adversarial proceeding, giving essentially a one-sided perspective to the arbitral tribunal. In the instant suit however, the plaintiff was free to confirm its suspicions and look for evidence to support what it felt was the real cause, which it eventually secured from the historical charts in London dating from the building of the causeway.

[70] In my view however the defendant's own admission that it deliberately chose not to raise the purported new facts does not do much, if at all, towards further strengthening the case of the defendant. The key point is whilst the new facts were not raised earlier, they could have been.

[71] The law does not serve its objective to meet the ends of justice if parties are permitted to re-litigate issues already decided by a court or tribunal of competent jurisdiction. A well-functioning legal system must be effective in promoting finality and certainty of judgments, and reining in multiplicity and inconsistency in decisions, as well as curbing unnecessary wastage of resources, time and costs.

[72] The fact that the new facts were never canvassed or determined in the arbitration proceedings because they allegedly arose after the final award, whilst true, does not assist the plaintiff. It must be appreciated that the key issues on the cause of and responsibility for the reclamation failure had been adjudicated and decided on. What the plaintiff asserted now is in effect that it had since discovered new evidence that could have made a difference to the decision on those issues. This is precisely the situation that issue estoppel in the wider sense seeks to proscribe. Surely the plaintiff could have and should have adduced the new facts to establish its case in the arbitration proceedings. Yet it decided not to, as part of what it now claims to be its calculated litigation strategy. Thus the omission to have raised the new facts was not inadvertent. Neither was it negligently omitted. It was, as the final award made it manifest, done deliberately. Res judicata thus must be applied to prevent a re-litigation of the same issues by this court.

[73] After all, even in the context of an appeal, the applicable legal

requirements, such as found in O 56 r 1(3A) of the Rules of Court 2012 on admissibility of fresh evidence at appeal hearing (albeit concerning appeals from decisions of registrar to the judge in chambers) would mean that the plaintiff would in my assessment have failed the twin tests of demonstrating first, the evidence would not have been obtainable at the trial even where reasonable diligence is exercised by the evidence — gatherer and secondly, the evidence would likely have a determining influence on the decision at the first instance (see *Ladd v Marshall* [1954] 3 All ER 745 and *Punca Klasik Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241). Both conditions must be satisfied for they are cumulative and to be read conjunctively (see *Lee Thye @ Lee Chooi Yoke v Societe Generale Cawangan Singapura* [2009] 6 MLJ 24). In the instant case, if it were an appeal situation, it would be quite clear from the circumstances alluded to earlier, that the plaintiff flatly failed at least to pass the reasonable diligence test.

[74] The plaintiff has not provided a convincing explanation why it did not raise the alleged new facts before the arbitration proceedings when the same issue as to the cause of the reclamation failure was so plain and obvious to all and sundry in the arbitration. In any event it does not really matter for the unchallenged fact is that plaintiff made a conscious decision not to lead evidence as to the cause of the reclamation failure. This immediately justifies the invocation of res judicata for it cannot equitably now say that it should be allowed to challenge the decision of the final award in this court by producing these alleged new facts. Otherwise, the entire foundation of the litigation and justice system would be brought into disarray if litigants could decide not to fully ventilate its case in a proceedings with a view to raising the evidence that could have been raised in that proceedings in a subsequent action.

[75] There is no evidence proffered by the plaintiff which at the slightest suggested that the new facts were in fact unavailable to be discovered prior to the arbitration proceedings. It cannot be validly disputed that the records on the relevant hydrographic charts have always been available at the United Kingdom Hydrographic Office, which the plaintiff only chose to procure after the pronouncement of the final award.

[76] In fact, the plaintiff's own expert gave evidence before the arbitral tribunal that it decided not to lead evidence as to the cause of the reclamation failure, for any efforts to examine the exact cause might not be particularly useful. This could well be the real reason why it was not raised earlier. This was recorded in the final award at para 236 as follows:

> 236. The Claimants made a forensic decision not to lead evidence as to the cause of the Reclamation Failure Incident. In fact, the Claimants' expert, Hendy indicated that while the exact cause of collapse could be studied in detail, such a study may not be particularly probative, and would now be hampered by the passage of time.

A **[77]** Indeed, it ought to be said that as the plaintiff has deliberately made the decision not to lead evidence on this issue, it should fairly be estopped from raising the new facts now (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

B **[78]** Neither has the plaintiff demonstrated that it had taken steps to present these new facts, which it claimed to be of significant importance in the nature that would make a difference to the decision of the arbitral panel, in its application to the High Court to set aside the final award.

C **[79]** In any event, these new facts constitutes only an opinion of the plaintiff which must by definition is at this juncture, subjective and tentative. In contradistinction, the final award represented the findings of the arbitral panel, which was also premised on evidence given by experts at the arbitration, D including the plaintiff's. Furthermore, the new facts could only present at best, a version of how the reclamation failure could in theory have occurred. It does not, as highlighted by the submissions of the defendant, address the cause of the reclamation failure which is the issue before both this court and the earlier arbitration proceedings. In this sense, it certainly cannot be said that the new E facts, had it been presented and considered, would have made a difference to the final award.

[80] In my view it would only be in limited circumstances that a party may be allowed to raise a matter that the party could have raised in an earlier action, F in a subsequent proceedings. I have suggested that the nature of a matter that could have been raised must be one that the law recognises as being capable of being considered in that earlier proceedings. Otherwise the plea of res judicata cannot succeed. Thus the argument that a petitioner's originating summons seeking various orders should be struck out by reason of res judicata because G such reliefs ought to have been prayed for in the earlier hearing of a winding up petition was held to be untenable because under s 221 of the Companies Act 1965, the court can only decide to grant or refuse the petition and cannot make any other orders. This was what I said in the case of *Lee Mun Lyn v Wong Kok Tung & Ors* [2015] MLJU 1226; [2015] 1 LNS 1246:

H

> [23] Equally fundamentally, if the reverse scenario is postulated, where the plaintiff did not raise these matters at the winding up proceedings, the defendants cannot challenge the bringing of the OS action on the ground that the matters raised in the OS should have been raised in the winding up proceedings earlier in time, precisely I for the identical reason that they could not and should not have been so raised in light of s 221 of the Companies Act 1965. If the defendants cannot attack the non-raising at the earlier proceedings, nor can they justifiably challenge the same when the plaintiff did raise the prayer for the reliefs erroneously because in both situations, the overriding position is that legally the matters are not fit to be considered at that winding up proceedings earlier in time.

> [24] Thus the ambit of issue estoppel, concerning matters that ought and could have been raised in an earlier proceedings should be properly understood to mean that such matters must in law be capable of being adjudicated under substantive law in the prior proceedings. Neither can the reliefs in question be construed as points or issues which although properly belong to the subject of litigation, might have been brought forward at the earlier winding up proceedings should the plaintiff exercise reasonable diligence. Had there been requisite diligence, in the instant case, the reverse would have been true, and the reliefs should not have been brought forward in the winding up proceedings. If otherwise, such as the situation in the instant case, the plea of res judicata cannot succeed.

[81] In the instant case however, there were no legitimate reasons that could have impeded the purported new facts from being raised in the earlier arbitration proceedings. Its exclusion is thus a bar to the same being now raised in the instant proceedings.

Other arguments of plaintiff unmeritorious

[82] The plaintiff argued that regard must be had to the considerations that the combination of unusual factors are not an uncommon occurrence in the construction industry as noted by the Court of Appeal in *AXA Affin Assurance Bhd v MTD Construction Sdn Bhd* [2013] 6 MLJ 323, in a case involving the design and construction of a road transportation system. The plaintiff contended that it is simplistic to allude to the faulty design exclusion and to suggest that by taking this stance in the arbitration proceedings, the plaintiff is now estopped from asserting liability under the CAR policy. This is because of the limits to the faulty design exclusion as recognised by the Court of Appeal in *AXA Affin Assurance Bhd v MTD Construction Sdn Bhd* [2013] 6 MLJ 323 which highlighted the question whether it is a combination of unusual or exceptional factors is clearly a matter to be determined at trial. The Court of Appeal held that faulty design could not be established given that the cause of damage was due to problems of nature which were unpredictable.

[83] In the instant case however, after having evaluated the extensive evidence, including from various experts, and in concluding its 162-page final award, the arbitral panel was clear in its determination that the flaws in the ground treatment works, being the responsibility of the plaintiff to be the cause of the reclamation failure. This was also in the findings of the arbitral tribunal, to be a design matter, and is certainly a workmanship issue, either of which attracted the exclusion of the liability of the defendant under endorsement 115 of the CAR policy.

[84] The plaintiff also referred to the recent decision of the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 which considered res judicata where it was held thus:

> ... since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to unjust result.

[85] In that case, there was the issue of new evidence in a subsequent suit. The Federal Court said this:

> [48] At this stage of the proceedings, we are satisfied that the respondents' statement of claim, particularly paras 22–29 thereof have complied with the basic requirements or elements, on the issue of new evidence as listed above. However, whether the said evidence could or could not be obtained with reasonable diligence, whether it would have an important influence on the result of the trial, and whether it is presumably to be believed, are purely questions of facts which can only be determined at full trial where witnesses can be called to testify and be cross-examined to established the truth, but not by way of affidavits evidence at the stage of summary proceedings of striking out under O 18 r 19 of the ROC as applied for by the appellant.

[86] I do not consider the case of *Seruan Gemilang* to be supportive of the position of the plaintiff herein because that case concerns a fresh suit filed to impeach and set aside an earlier judgment on the ground of fraud. Significantly, the Federal Court in that case held that the court could decline to apply res judicata, if its application would lead to unjust result. Given my finding of the same issue having been determined, I do not find it unjust to apply res judicata in the instant case. Instead, not prohibiting the plaintiff from raising the new facts in the instant suit would be contrary to the interest of justice.

[87] The plaintiff raised various other arguments to resist this striking out application. For completeness, I will set them out in summary fashion, as follows:

(a) the defendant's rejection of CMP's claim may not have been entirely objective due to its relations with CMP through the Berjaya Group of Companies, and was based on selective, skewed and biased information reports submitted to it by CMP without the knowledge of the plaintiff, designed to place the blame for the reclamation failure incident on the plaintiff, alleging that the cause of the same was the plaintiff's defective workmanship. The defendant excluded the plaintiff, without its knowledge, from matters pertaining to the CAR policy, thereby disregarding the plaintiff's rights as a co-assured under the CAR policy. The plaintiff as a co-assured under the CAR policy has its own respective rights and interests, separate from CMP as the principal;

(b) the repudiation of liability under the CAR policy was wrongful for the arbitration proceedings revealed that purported design report, which formed the very basic of the repudiation of liability by the defendant, was only produced subsequent to the execution of the contract between

CMP and the plaintiff, and also after the reclamation failure. The said design report was never provided to the plaintiff prior to March 2011. The defendant's contention that its repudiation of insurance coverage was not merely based solely on the design report, but also its own independent findings of the claim, was not supported by evidence of any independent findingsl

(c) in addition, the defendant's refusal to allow the plaintiff to re-submit the insurance claim with the proper supporting documents to ensure that the plaintiff's rights and interests were protected, all constitute bad faith on the part of the defendant in making its assessment of the intended claim by the plaintiff under CAR policy; and

(d) the defendant thus breached the terms of the CAR policy and its duty of utmost good faith to the plaintiff as the defendant has a continuing duty to reinvestigate the claim upon discovery of new facts (see the New South Wales Supreme Court case of *Dumitrov v SC Johnson & Son Superannuation Pty Ltd & Anor* [2006] NSWSC 1372).

[88] Placing things in the right perspective and context, I am of the view that the various events as aforesaid, which the plaintiff claimed to have transpired prior to the issuance of the letter of repudiation, its involvement in the initial claim process, the events which took place thereafter, the defendant's refusal to accept the fresh claim from the plaintiff, as well as on the true extent of the defendant's reliance on the design report are, as correctly argued by the defendant, all matters which are irrelevant to both this striking out application as well as the plaintiff's claim under the CAR policy.

[89] They cannot be relevant because the single most crucial issue herein is whether the claim of the plaintiff can be indemnified under the provisions of the CAR policy or if it is specifically excluded under the terms of endorsement 115. If the claim cannot be brought within the four corners of the CAR policy, there is no coverage that can accrue to the plaintiff. All the allegations against the defendant, including on accusation of bad faith, even if proven, would amount, for all intents and purposes, to nothing beyond the inconsequential, if the claim for losses can legitimately be excluded under endorsement 115, which is the case herein. Indeed, as the key finding of this court, is that the final award findings would invoke the application of endorsement 115 to exclude the liability of the defendant to indemnify the plaintiff for the losses directly resulting from the reclamation failure, it is unnecessary for this court to consider these other arguments of the plaintiff. They are patently irrelevant and cannot be remotely triable at the slightest.

A CONCLUSION

[90] In view of the myriad of reasons that I have discussed earlier in this judgment, it is my ruling that the defendant has on a balance of probabilities more than amply demonstrated that having regard to case law authorities such as the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 it is plain and obvious that, by reason principally of res judicata, the claim filed by the plaintiff was obviously unsustainable and was also at the same time frivolous and vexatious, and otherwise an abuse of the process of the court under O 18 r 19(1)(b) and (d) respectively. Accordingly, encl 5 is thus allowed and the statement of claim in encl 1 struck out, with costs.

Application allowed.

Reported by Afiq Mohamad Noor